

APPEAL NO. 172615
FILED DECEMBER 14, 2017

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on October 5, 2017, in (city), Texas, with (administrative law judge) presiding as the administrative law judge (ALJ). The ALJ resolved the disputed issues by deciding that: (1) the compensable injury of (date of injury), does not extend to impingement syndrome and recurrent right shoulder rotator cuff tear; (2) the appellant (claimant) reached maximum medical improvement (MMI) on November 13, 2014; and (3) the claimant's impairment rating (IR) is one percent.

The claimant appealed the ALJ's determinations as being contrary to the evidence. The respondent (self-insured) responded, urging affirmance.

DECISION

Affirmed in part and reversed and remanded in part.

It is not disputed that the claimant, a police officer for the self-insured, sustained a compensable injury on (date of injury), when struck by a vehicle while he was directing traffic. The parties stipulated, in part, that the Texas Department of Insurance, Division of Workers' Compensation (Division) appointed (Dr. H) as the designated doctor to address MMI, IR, and extent of injury and that the self-insured has accepted as compensable a right shoulder strain and exacerbation of the previously repaired right shoulder.

EXTENT OF INJURY

The ALJ's determination that the compensable injury of (date of injury), does not extend to impingement syndrome or a recurrent right shoulder rotator cuff tear is supported by sufficient evidence and is affirmed.

MMI

The ALJ's determination that the claimant reached MMI on November 13, 2014, is supported by sufficient evidence and is affirmed.

IR

Section 408.125(c) provides that the report of the designated doctor shall have presumptive weight, and the Division shall base the IR on that report unless the

preponderance of the other medical evidence is to the contrary, and that, if the preponderance of the medical evidence contradicts the IR contained in the report of the designated doctor chosen by the Division, the Division shall adopt the IR of one of the other doctors. 28 TEX. ADMIN. CODE § 130.1(c)(3) (Rule 130.1(c)(3)) provides, in pertinent part, that the assignment of an IR shall be based on the injured employee's condition as of the MMI date considering the medical record and the certifying examination. The ALJ found that the certification of MMI/IR from Dr. H is not contrary to the preponderance of the other medical evidence.

Dr. H examined the claimant on January 24, 2017, and certified that the claimant reached MMI on November 13, 2014, with a one percent IR pursuant to the Guides to the Evaluation of Permanent Impairment, fourth edition (1st, 2nd, 3rd, or 4th printing, including corrections and changes as issued by the American Medical Association prior to May 16, 2000) (AMA Guides). Using range of motion (ROM) measurements obtained on the MMI date by the treating doctor (Dr. Ha),¹ Dr. H assessed two percent whole person impairment for the right upper extremity based upon loss of ROM. Dr. H then subtracted one percent whole person impairment from that assessment based upon ROM measurements obtained by a (Dr. N) on September 25, 2014, to take into account the decrease in ROM existing prior to the work-related injury of (date of injury), which reduction resulted in the assigned one percent IR adopted by the ALJ.

The Appeals Panel has held it to be error for an ALJ to adopt an IR assigned by a doctor who applied an analysis of contribution from a prior compensable injury in assigning an IR for the claimant. See Appeals Panel Decision (APD) 150378, decided May 8, 2015. Although no evidence was offered in this case that the claimant's restricted right shoulder ROM documented by Dr. N prior to the compensable injury was the result of a previous compensable injury, the analysis in APD 150378 is instructive. Dr. H's assignment of IR is not based upon the injured employee's condition as of the MMI date as required by Rule 130.1(c)(3) and, for such reason, we reverse the ALJ's determination that the claimant's IR is one percent.

There are no other certifications of IR in evidence. Accordingly, we remand the issue of IR to the ALJ for further action consistent with this decision.

SUMMARY

We affirm the ALJ's determination that the compensable injury of (date of injury), does not extend to impingement syndrome or a recurrent right shoulder rotator cuff tear.

¹ We note that Dr. Ha's ROM measurements taken on November 13, 2014, do not include a measurement recorded in degrees for internal rotation of the right shoulder.

We affirm the ALJ's determination that the claimant reached MMI on November 13, 2014.

We reverse the ALJ's determination that the claimant's IR is one percent, and we remand the issue of IR to the ALJ for further action consistent with this decision.

REMAND INSTRUCTIONS

Dr. H is the designated doctor in this case. On remand, the ALJ is to determine whether Dr. H is still qualified and available to be the designated doctor. If Dr. H is no longer qualified or is not available to serve as the designated doctor, then another designated doctor is to be appointed to determine the claimant's IR for the (date of injury), compensable injury.

The ALJ is to advise the designated doctor that the compensable injury of (date of injury), extends to a right shoulder strain and exacerbation of the previously repaired right shoulder but does not extend to impingement syndrome and recurrent right shoulder rotator cuff tear.

The ALJ is to advise the designated doctor that it has been determined that the claimant reached MMI on November 13, 2014, and the designated doctor should rate the entire compensable injury in accordance with the AMA Guides based upon the injured employee's condition as of the MMI date considering the medical record and certifying examination.

The parties are to be provided with the designated doctor's MMI/IR certification and are to be allowed an opportunity to respond. The ALJ is to reconsider the evidence on IR, including the designated doctor's certification, and make a determination concerning IR consistent with this decision.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the ALJ, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Division, pursuant to Section 410.202 which was amended June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code in the computation of the 15-day appeal and response periods. See APD 060721, decided June 12, 2006.

The true corporate name of the insurance carrier is **CITY OF HOUSTON (a self-insured governmental entity)** and the name and address of its registered agent for service of process is

**ANNA RUSSELL - CITY SECRETARY
900 BAGBY
HOUSTON, TEXAS 77002.**

K. Eugene Kraft
Appeals Judge

CONCUR:

Carisa Space-Beam
Appeals Judge

Margaret L. Turner
Appeals Judge